

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT CHRISTOPHER JIMENEZ,

No. C 06-3549 SI (pr)

Petitioner,

**ORDER REQUIRING ELECTION BY
PETITIONER ON UNEXHAUSTED
CLAIMS**

v.

D. SISTO, warden,

Respondent.
_____**INTRODUCTION**

Robert Christopher Jimenez, an inmate at the California State Prison - Solano, filed this pro se action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court issued an order to show cause why the writ should not be granted. Respondent filed an answer in which he asserted that state judicial remedies had not been exhausted for most of the claims in the petition. Jimenez filed a responsive document but did not dispute that his claims were not exhausted. For the reasons discussed below, Jimenez will be required to choose what to do about the unexhausted claims in his petition.

BACKGROUND

Jimenez was convicted in 2004 in Santa Clara County of murder and being a felon in possession of a firearm. Sentence enhancement allegations were found true. He was sentenced to a total of 70 years to life in state prison. Jimenez appealed. The California Court of Appeal affirmed his conviction and the California Supreme Court denied his petition for review. Jimenez did not file any state habeas petitions challenging his conviction.

1 In the order to show cause, the court determined that Jimenez had alleged five ineffective
2 assistance of trial counsel claims in his petition and amendment thereto. Jimenez alleged that
3 he received ineffective assistance of counsel in that counsel (1) failed to investigate and make
4 a helpful argument at the sentencing phase of his case, (2) failed to explain the district attorney's
5 plea bargain offer, (3) did not investigate the case thoroughly, (4) failed to argue that possession
6 of a firearm is distinctly antecedent and separate from the primary offense, and (5) failed to
7 inform Jimenez of a conflict of interest. Respondent asserted in his answer that claims 2, 3, and
8 5 were not presented to the California Supreme Court. Respondent also contended that Jimenez
9 already received the relief requested in Claim 4 when the California Court of Appeal stayed part
10 of his sentence – which may explain why Claim 4 also was not mentioned in the petition for
11 review.

12 13 DISCUSSION

14 Prisoners in state custody who wish to challenge collaterally in federal habeas
15 proceedings either the fact or length of their confinement must first exhaust state judicial
16 remedies, either on direct appeal or through collateral proceedings, by presenting the highest
17 state court available with a fair opportunity to rule on the merits of each and every claim they
18 seek to raise in federal court. See 28 U.S.C. § 2254(b),(c); Rose v. Lundy, 455 U.S. 509, 515-16
19 (1982); Duckworth v. Serrano, 454 U.S. 1, 3 (1981). The exhaustion-of-state-remedies doctrine
20 reflects a policy of federal-state comity to give the state "the initial "opportunity to pass upon
21 and correct" alleged violations of its prisoners' federal rights." Picard v. Connor, 404 U.S. 270,
22 275 (1971) (citations omitted).

23 The court has compared Jimenez's federal habeas petition with the petition for review he
24 filed in the California Supreme Court. See Resp. Exh. E. The ineffective assistance of counsel
25 claims in his federal petition identified as Claims 2, 3, 4, and 5 were not included in his petition
26 for review. Claim 1 was the only claim presented to the California Supreme Court. The
27 California Supreme Court has not had a fair opportunity to rule on the merits of Claims 2, 3, 4,
28 and 5 because they were not included in the petition for review and Jimenez did not file any

1 collateral challenge to his conviction in that court. State court remedies have not been exhausted
2 for Claims 2, 3, 4, and 5.

3 Jimenez's petition contains both exhausted and unexhausted claims and therefore is what
4 is referred to as a "mixed" petition. See Rhines v. Weber, 544 U.S. 269, 277 (2005). The court
5 cannot adjudicate the merits of a habeas petition containing any claim as to which state remedies
6 have not been exhausted, such as a mixed petition. See Rose v. Lundy, 455 U.S. at 522.

7 Due to a critical one-year statute of limitations on the filing of federal habeas petitions
8 under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), see 28 U.S.C. §
9 2244(d), the court is reluctant to dismiss the mixed petition (and possibly cause a later-filed
10 petition to be time-barred) without giving Jimenez the opportunity to elect whether to proceed
11 with just his exhausted claim, or to try to exhaust the unexhausted claims before having this
12 court consider all five claims. Accordingly, instead of an outright dismissal of the action, the
13 court will allow Jimenez to choose whether he wants to –

- 14 (1) dismiss the unexhausted claims and go forward in this action with only the exhausted
15 claim, or
- 16 (2) dismiss this action and return to state court to exhaust all claims before filing a new
17 federal petition presenting all of his claims, or
- 18 (3) file a motion for a stay of these proceedings while he exhausts his unexhausted claims
19 in the California Supreme Court.

20 Jimenez is cautioned that the options have risks and drawbacks he should take into account in
21 deciding which option to choose. If he chooses option (1) and goes forward with only his
22 exhausted claim, he may face dismissal of any later-filed petition. See 28 U.S.C. § 2244(b). If
23 he chooses option (2), dismissing this action and returning to state court to exhaust all claims
24 before filing a new federal petition, his new federal petition may be rejected as time-barred. See
25 28 U.S.C. § 2244(d). If he chooses option (3), he must file a motion in this court to obtain a stay
26 and (if the motion is granted) then must act diligently to file in the California Supreme Court,
27 to obtain a decision from the California Supreme Court on his unexhausted claim, and to return
28 to this court. And under option (3), this action stalls: this court will do nothing further to

1 resolve the case while petitioner is diligently seeking relief in state court.

2 In Rhines, the U.S. Supreme Court discussed the stay-and-abeyance procedure for mixed
3 habeas petitions. The Court cautioned district courts against being too liberal in allowing a stay
4 because a stay works against several of the purposes of the AEDPA in that it "frustrates
5 AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of
6 the federal proceeding" and "undermines AEDPA's goal of streamlining federal habeas
7 proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior
8 to filing his federal petition." Rhines, 544 U.S. at 277. A stay and abeyance "is only appropriate
9 when the district court determines there was good cause for the petitioner's failure to exhaust his
10 claims first in state court," the claims are not meritless, and there are no intentionally dilatory
11 litigation tactics by the petitioner. Id. at 277-78. Any stay must be limited in time to avoid
12 indefinite delay. Id. Reasonable time limits would be 30 days to get to state court, as long as
13 necessary in state court, and 30 days to get back to federal court after the final rejection of the
14 claims by the state court. See id. at 278; Kelly v. Small, 315 F.3d 1063, 1071 (9th Cir. 2003).

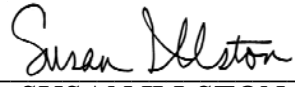
15 16 17 CONCLUSION

18 The petition is a mixed petition. Petitioner must serve and file no later than **June 20,**
19 **2008**, a notice in which he states whether he elects to (1) dismiss the unexhausted claims and go
20 forward in this action with only the remaining claim, or (2) dismiss this action and return to state
21 court to exhaust all of his claims before returning to federal court to present all of his claims in
22 a new petition, or (3) moves for a stay of these proceedings while he exhausts his state court
23 remedies for the unexhausted claims. If he chooses Option (1) or Option (2), his filing need not
24 be a long document; it is sufficient if he files a one-page document entitled "Election By
25 Petitioner" and states simply: "Petitioner elects to proceed under option ____ provided in the
26 court's Order Requiring Election." Petitioner would have to insert a number in place of the blank
27 space to indicate which of the first two options he chooses. If he chooses Option (3), petitioner
28 must file a motion for a stay in which he explains why he failed to exhaust his unexhausted

1 claims in state court before presenting them to this court, that his claims are not meritless, and
2 that he is not intentionally delaying resolution of his constitutional claims. He must serve and
3 file the motion for a stay no later than **June 20, 2008**. If petitioner does not choose one of the
4 three options or file a motion by the deadline, the court will dismiss the unexhausted claims.

5 IT IS SO ORDERED.

6 DATED: May 1, 2008



SUSAN ILLSTON
United States District Judge